SUPREME COURT OF THE UNITED STATES

No. 353.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

FRANK BOWEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the [SEAL.] circuit court of the United States for the third circuit and district of New Jersey, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said circuit court before you, between the United States of America and Frank Bowen, a manifest error hath happened, to the great damage of the said United States, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourteenth day of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this twelfth day of December, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

ANDREW DUTCHER, *Clerk.*

A. Q. KEASBEY,
U. S. Dist. Att'y.

2 The record and proceedings, whereof mention is within made, together with all things touching and concerning the same, I hereby certify to the Supreme Court of the United States, annexed to this writ, as within I am commanded.

Ret'ble January 14, 1864.

A. Q. KEASBEY,
U. S. District Att'y.

3 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Frank Bowen, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the fourteenth day of January next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the third circuit and district of New Jersey, wherein the United States

are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Richard S. Field, one of the judges of the circuit court of the United States for the third circuit and district of New Jersey, the twelfth day of December, 1863.

R. S. FIELD, *Judge.*

4 I acknowledge due and legal service of the within citation, Dec. 12, 1863.

C. H. WINFIELD, *Att'y.*

5 Pleas before the United States circuit court for the third circuit, and in and for the district of New Jersey, in the term of September, in the year of our Lord one thousand eight hundred and sixty-three; the honorable Robert C. Grier, associate justice of the Supreme Court of the United States, and the honorable Richard S. Field, judge of the district of New Jersey, judges; Andrew Dutcher, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the [L. S.] district court of the United States for the district of New Jersey, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said district court before you, between the United States and Frank Bowen, a manifest error hath happened, to the great damage of the said the United States, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United
6 States for the third circuit and district of New Jersey, together with the writ, so that you have the same at Trenton, in the said district, on the twenty-fourth day of November next, in the said circuit court, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at Trenton, the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty-eighth.

ANDREW DUTCHER, *Clerk.*

A. Q. KEASBEY,
U. S. Dist. Att'y.

The record and proceedings, whereof mention is within made, together with all things touching and concerning the same, I certify to the circuit court of the United States, annexed to this writ, as within I am commanded.

R. S. FIELD,
District Judge.

Pleas before the United States district court for the district of New Jersey, in the term of September, eighteen hundred and sixty-three; Hon. Richard S. Field, U. S. district judge; R. H. Shreve, cl'k.

In the district court of the United States for the district of
7 New Jersey, of the first Monday in June, in the year of our Lord one thousand eight hundred and sixty-three.

DISTRICT OF NEW JERSEY, *ss:*

Frank Bowen was summoned to answer the United States of America, who sue as well for Daniel M. Wilson, collector of internal revenue for the fifth district of New Jersey, as for themselves in this behalf, of a plea that he render unto the said the United States and to the said Daniel M. Wilson, collector as aforesaid, the sum of five hundred dollars, which he owes to and unjustly detains from them; and thereupon the said plaintiffs, by Anthony Q. Keasbey, their attorney, complain: for that whereas heretofore, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and sixty-three, and on divers days and times between that day and the commencement of this suit, and during the continuance of a certain act of Congress of the United States of America, entitled "An act to amend 'An act to provide internal revenue to support the government, and to pay interest on the public debt,' approved July first, ——— year of our Lord one thousand eight*een* hundred and sixty-two, and for other purposes," at Jersey City, in the county of Hudson, in the said district, the said defendant did exercise and carry on the trade or business of a lottery ticket dealer, for the exercising and carrying on of which trade or business a license was required by the said act of Congress, without taking out such license, as in that behalf required, contrary to the aforesaid act of Congress of the United States of America, approved July 1, 1862, and the said act to
8 amend the same in such case made and provided; whereby, and by virtue of the said act of Congress in such case made and provided, he, the said defendant, hath forfeited and become liable to pay to the uses expressed in the said act of Congress, the sum of five hundred dollars, being three times the amount of the duty or sum of money imposed for such license; and thereby, and by force of the said statute in such case made and provided, an action hath accrued to the said United States, who sue as aforesaid, to demand and have for the said Daniel M. Wilson, collector as aforesaid, and for themselves in this behalf, of and from the said Frank Bowen, the said sum of five hundred dollars, so forfeited as aforesaid, being the sum above demanded; yet the said defendant (although often requested so to do) hath not as yet paid the said sum of five hundred

dollars, above demanded, or any part thereof, to the said plaintiffs, but to do this hath hitherto wholly refused, and still doth refuse, to the damage of the plaintiffs of ten dollars, and therefore they bring their suit, &c.

And the said Frank Bowen, by Charles N. Winfield, his attorney, comes and defends the wrong and injury, when, &c., and says that he does not owe to Daniel M. Wilson and to the said the United States of America, who sue as aforesaid, or to either of them, the said sum of money above demanded, or any part thereof, in manner and form as the said the United States of America, who sue as aforesaid, have above thereof complained against him, and of this he puts himself upon the country, &c.

9 And for a further plea in this behalf the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that he ought not to be charged with the said debt, by virtue of the said supposed act of Congress of the United States and amendments thereto, because he says that by a certain act of the legislature of the State of New Jersey, entitled "An act for the suppressing of lotteries," approved the tenth day of April, eighteen hundred and forty-six, in words following, to wit:

"Sec. 1. All lotteries for money, goods, wares, merchandise, chattels, lands, tenements, hereditaments, or other matters or things whatsoever, shall be, and hereby are, adjudged to be common and public nuisances, and the supreme court, the courts of oyer and terminer and general jail delivery, and the courts of general quarter sessions of the peace, shall, respectively, have cognizance of such offences.

"Sec. 2. No person or persons shall, within this State, publicly or privately, erect, set up, open, make, or draw any such lottery or lotteries, and every person who shall offend in the premises shall forfeit for every such offence two thousand dollars, to be recovered by action of debt, with costs, by any person who will sue for the same, in any court of record having cognizance thereof; and the person so offending shall likewise be proceeded against by way of indictment, as is directed in the preceding section, and all penalties recovered under this act shall be appropriated to the use of the county in which the action or actions for the recovery thereof shall have been prosecuted; and in every action instituted under this act
10 the inhabitants of the county, where the same is instituted, shall be competent to serve as jurors, and admitted as witnesses in any such action, notwithstanding their liability to taxation or being interested.

"Sec. 3. If any person shall give, barter, sell, or otherwise dispose of, any ticket or tickets in any lottery, whether erected, set up, opened, or made in this State or elsewhere; or if any person shall be aiding or assisting in any such lottery by printing, writing, or in any other manner publishing an account thereof, or where tickets may be had or obtained in the same; or if any person shall set up, show, or expose to public view, any scheme or schemes, advertisement or advertisements, of or concerning such lottery, or shall permit or

suffer any such lottery to be drawn in or on his or her house or land, every person so offending shall, for every offence, forfeit and pay the sum of thirty dollars, to be recovered and applied in the manner prescribed in and by the section next preceding.

"Sec. 4. Every grant, bargain, sale, conveyance, or transfer of any goods, chattels, lands, tenements, hereditaments, or real estate, which shall be made in pursuance of any such lottery is hereby declared to be invalid and void.

"Sec. 5. This act shall not extend to or affect any lottery which shall be established by or under the authority of the United States, or which has been or shall be established by or under the authority of the legislature of this State;"

and by a certain supplement thereto, approved on the twenty-
11 fourth day of March, in the year eighteen hundred and fifty-two, in the following words, to wit:

"Sec. 1. If any person shall give, barter, or sell, or otherwise dispose of, or offer to give, barter, sell, or otherwise dispose of, any ticket or tickets, or any share or interest in any ticket or tickets in any lottery, whether erected, set up, opened, or made in this State or elsewhere, or the chance or chances of any such ticket or tickets, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding one hundred dollars, or imprisonment at hard labor not exceeding one year, or both.

"Sec. 2. If any person or persons shall issue any policy of insurance, or insure or receive any consideration for insurance, for or against the drawing of any ticket or tickets, number or numbers, or any share or interest in any ticket or tickets in any lottery, or shall receive any money, goods, or thing in action, in consideration of any agreement to repay any sum or sums of money, or to deliver any goods or thing in action; if any ticket or tickets in any lottery shall prove fortunate or unfortunate, or shall be drawn or not drawn, or drawn on any particular day or in any particular order, or shall promise or agree to pay any sum of money, or deliver any goods or things in action, or to do or forbear to do anything for the benefit of any other person or persons, upon any event or contingency dependant on the drawing of any ticket or tickets, or any share of any ticket or tickets, or upon the drawing of any number or numbers in any lottery, shall be deemed guilty of a misdemeanor, and on con-
12 viction shall be punished by fine not exceeding one hundred dollars, or imprisonment at hard labor not exceeding one year, or both.

"Sec. 3. It shall not be necessary, upon the trial of any indictment under this act, to prove the existence of any lottery in which any ticket, share, or part of a ticket purports to have been issued, or the actual signing of any such ticket or share; nor that any ticket, share, or interest was signed or issued by the authority of any manager, or of any person assuming to have authority as manager, or the existence of any lottery in which any number or numbers may be charged to have been insured; but, in all cases, proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest

therein, or of any instrument purporting to be a ticket, or part or share of any ticket, shall be conclusive evidence that such ticket, share, or interest was signed and issued according to the purport thereof.

"Sec. 4. One-half of every fine inflicted and collected under any of the premises of this act shall, when collected, be paid to the person giving information, by reason of which a conviction shall be had;" the said defendant is, and from the approval of said act hitherto hath been, prohibited and entirely precluded from exercising and carrying on the lottery business in the State of New Jersey, and this the said defendant is ready to verify; whereof he prays judgment, if he ought to be charged with the said debt, by virtue of the said act of Congress of the United States and the amendment thereto.

And the said plaintiffs to the said plea of the said defend-
13 ant by him first above pleaded, and whereof he hath put himself upon the country, do the like, &c.

And the said plaintiffs, as to the said plea of the said defendant by him secondly above pleaded, say that the same, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiffs from having or maintaining their aforesaid action thereof against the said defendant, and that the said plaintiffs are not bound by law to answer the same, and this the said plaintiffs are ready to verify; whereof, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment and their debt aforesaid, together with their damages by them sustained, on occasion of the detention thereof to be adjudged to them, &c.

And now, at this day, before the honorable Richard S. Field, judge of the United States district court, came the parties aforesaid; but because the judge of the said court now here is not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid before our said court, at Trenton, until the third Tuesday of September, in the year of our Lord one thousand eight hundred and sixty-three, to hear judgment thereon; at which day, before the honorable Richard S. Field, judge of our said court, at Trenton, came the parties aforesaid, by their attorneys aforesaid; whereupon, all and singular the premises being seen, and by the court now here fully understood, and mature deliberation being had thereupon, it appears to the said court here that the said plea
14 above pleaded by the said Frank Bowen, in manner and form aforesaid. and the matters therein contained, are sufficient in law to bar the said the United States from having or maintaining their said action against the said Frank Bowen, therefore it is considered that the said the United States take nothing by their said writ, and that the said Frank Bowen do go thereof without day.

I, Ralph H. Shreve, clerk of the United States district court for the district of New Jersey, do certify that the foregoing is a true copy of the judgment and proceedings in the above stated case, as the same are on record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this fourth day of November, in the year of our Lord one thousand eight hundred and sixty-three.

[L. S.]

RALPH H. SHREVE, *Cl'k.*

UNITED STATES OF AMERICA, *ss:*

To Frank Bowen, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States, to be held at Trenton, in and for the district of New Jersey, on the twenty-fourth day of November next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the said district of New Jersey, wherein the United States are plaintiffs and you are defendant in error,
15 to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 28th day of October, in the year eighteen hundred and sixty-three.

R. S. FIELD,
District Judge.

United States circuit court, district of New Jersey.

THE UNITED STATES
vs.
FRANK BOWEN.

Afterwards, that is to say, on the twenty-fourth day of November, in the year eighteen hundred and sixty-three, before the judges of the circuit court of the United States for the district of New Jersey, in the third circuit, come the said the United States, by Anthony Q. Keasbey, their attorney, and say that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, that the said plea of the said defendant by him secondly above pleaded is not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their aforesaid action thereof against him, the said Frank Bowen.

And also that there is error in this, that the judgment aforesaid appears to have been given for the said Frank Bowen against
16 the said United States; whereas, by the law of the land, the said judgment ought to have been given for the said the United States against the said Frank Bowen.

And the said the United States pray that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for naught, and that they may be restored to all things which they have lost by reason of the said judgment, &c.

A. Q. KEASBEY,
U. S. Dist. Att'y.

Circuit court of the United States, in and for the district of New Jersey.—September term, eighteen hundred and sixty-three.

THE UNITED STATES *vs.* FRANK BOWEN. } In debt.—On error to the U. S. dist. court of New Jersey.

And now on this day, to wit, the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and sixty-three, before the honorable Robert C. Grier, associate justice of the Supreme Court of the United States, came the said parties, by their counsel, and this cause coming on for hearing on the transcript of the record from the United States district court of New Jersey, after considering the same, it is ordered and adjudged that the judgment of the said district court be in all things affirmed.

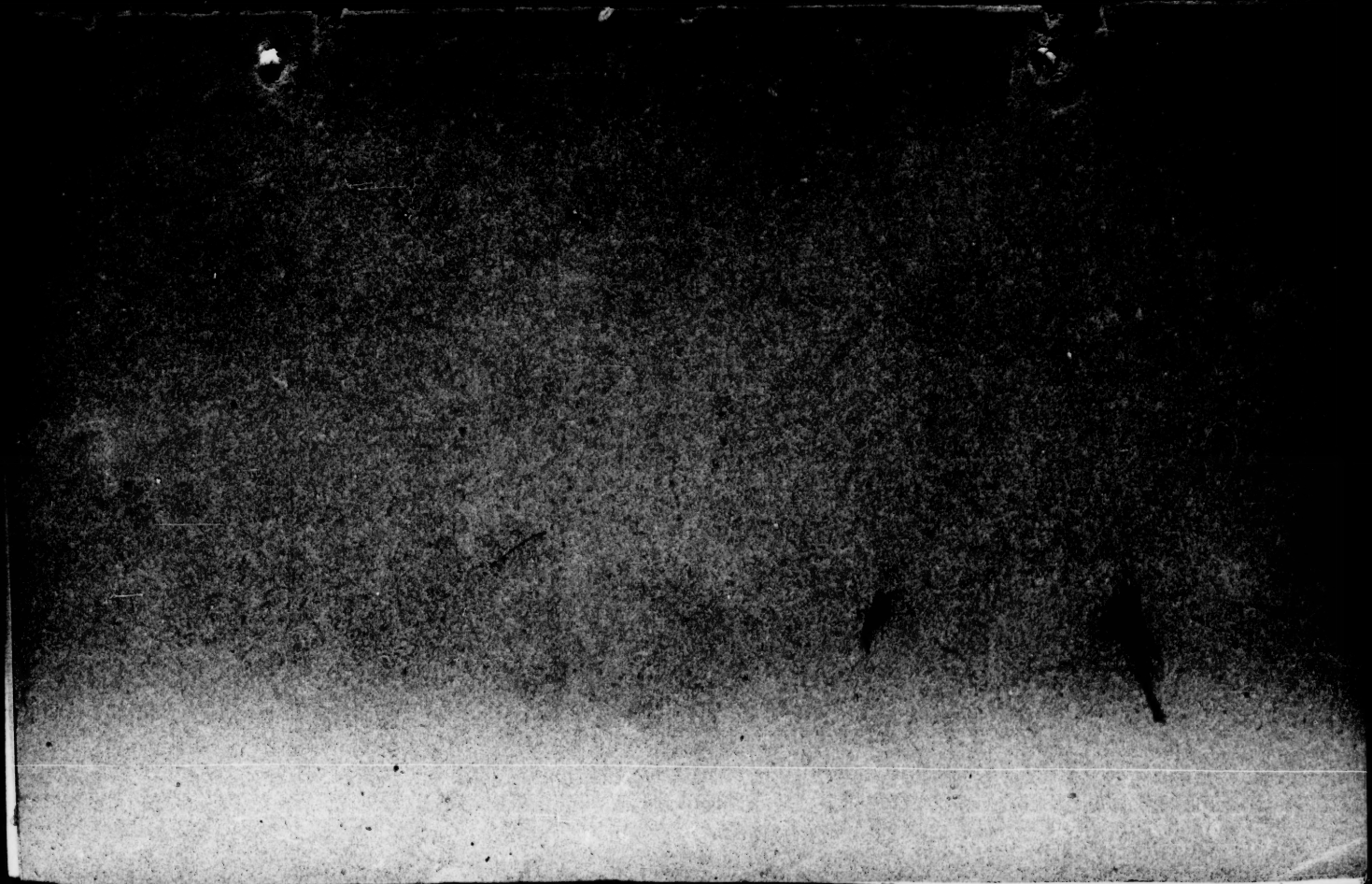
17 UNITED STATES OF AMERICA,
District of New Jersey, ss:

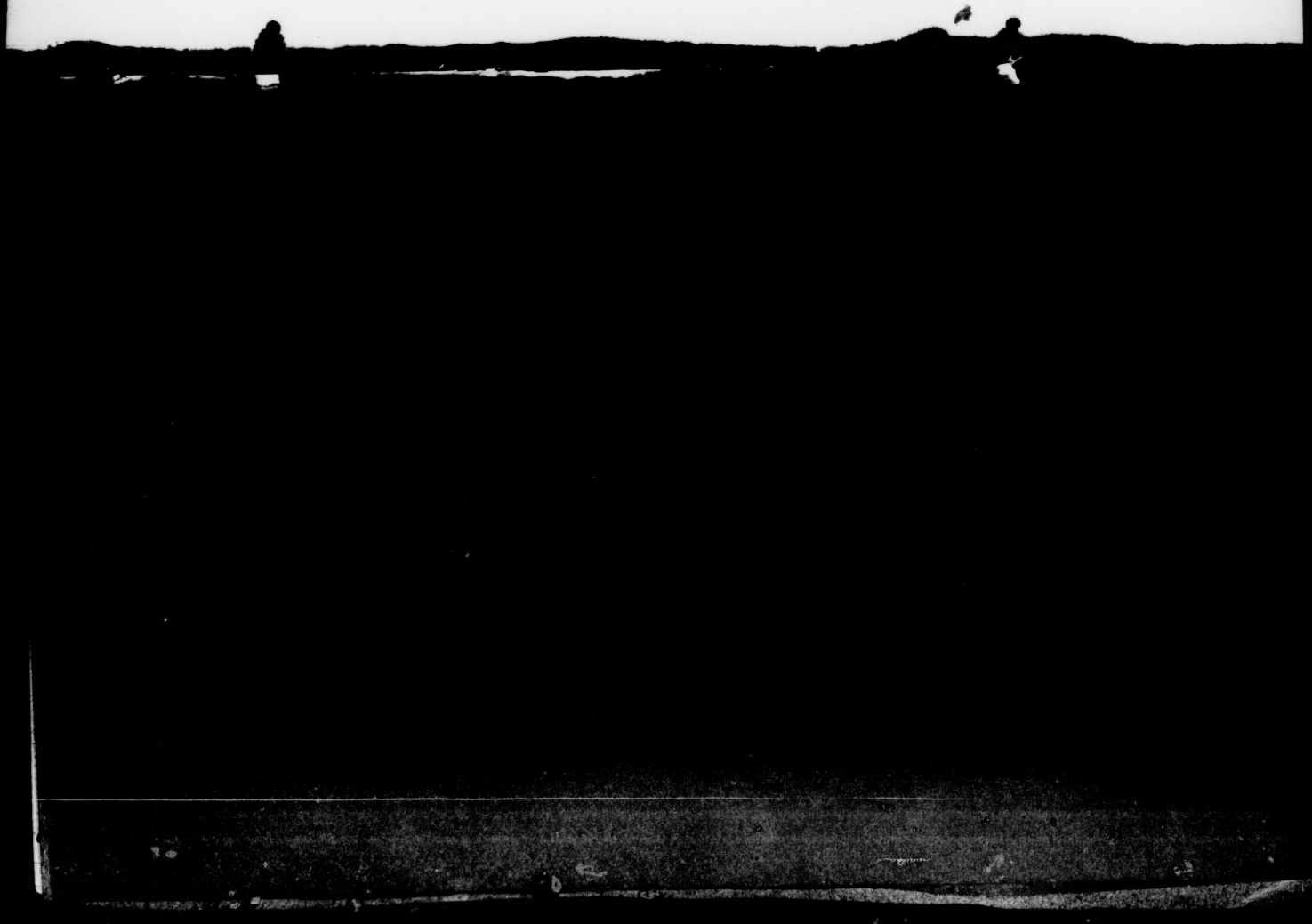
I, Andrew Dutcher, clerk of the United States circuit court for the third circuit and district of New Jersey, do hereby certify that the foregoing is a true copy of the record, judgment, and proceedings in the above stated cause, as fully as the same remain on file and record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, at Trenton, this twenty-sixth day [SEAL.] of December, in the year of our Lord eighteen hundred and sixty-three.

ANDREW DUTCHER, *Clerk.*

Filed 12th January, 1864.





In the Supreme Court of the United States.

DECEMBER TERM, 1865.

UNITED STATES *vs.* SAMUEL SCHUREMAN.	No. 129.
SAME *vs.* THOMAS GREEN.	No. 130.
SAME *vs.* JOHN BEATTY.	No. 131.
SAME *vs.* JOHN SHELLY.	No. 132.
SAME *vs.* FRANK BOWEN.	No. 133.
SAME *vs.* RUFUS B. VASSAR.	No. 84.

STATEMENT AND ARGUMENT FOR THE UNITED STATES.

The five cases first named above are writs of error upon judgments in the circuit court of the United States for the district of New Jersey. Suits were instituted in the district court by the United States to recover of the defendants the penalty denounced by the revenue laws, because they exercised and carried on the trade or business of a lottery ticket dealer, without taking out license as required by the acts of Congress. They were actions of debt. The defendants in each action pleaded,

1st, nil debit; 2d, specially, that they ought not to be charged because the business of dealing in lottery tickets is unlawful in New Jersey, such business having been entirely prohibited by the legislature of that State. The special plea was demurred to by the district attorney, and the demurrer overruled by the court. The records were by writs of error taken to the circuit court, and the judgment of the district court affirmed. The records are now in this court by writs of error.

Rufus B. Vassar was indicted in the circuit court of the United States in the northern district of New York, for knowingly and unlawfully exercising the trade and business of a lottery ticket dealer, without having a license therefor, in compliance with the acts of Congress. The indictment was demurred to, with the stipulation between the parties that the defendant might have the same benefit as if he had specially pleaded the constitution and laws of New York on the subject of raffling and lotteries and also pleaded that he was a citizen of New York at the time mentioned in the indictment. The business mentioned and described in the indictment was unlawful and wholly prohibited by the laws of New York, and the party carrying it on liable to indictment, conviction and punishment for a violation of the statutes of the State.

On the question whether the accused could be convicted, the judges were opposed in opinion, and this difference is certified to this court.

The questions which the court is called upon to determine in these cases are: 1st, can the United States impose and collect a tax on a pursuit or calling in a State which is totally prohibited by its laws, and for the pursuing of which the person can be indicted, convicted and punished by the State authorities; and 2d, if the general government can impose and collect a tax in the case supposed, do the proceedings show a breach of law, and no justification or excuse therefor?

Can Congress impose and collect a tax on a pursuit or calling in a State which is totally prohibited by the laws of the State, and for the pursuing of which calling he can be indicted, convicted and punished by the State authorities?

Congress legislates for the nation, and has the power to tax all forms of industry, and all the pursuits of life. (Con., art. 1, sec. vii, cl. 2; Brown *v.* Maryland, 12 Wheaton, 419; McCulloch *v.* The State of Maryland, 4 Wheaton, 316; Weston *v.* The City Council of Charleston, 2 Pet., 449; Dobbins *v.* The Commissioners of Erie County, 16 Pet., 448. See, also, for general exposition of the relations between the State and Federal sovereignties in respect to this and similar powers, the Passenger Cases, 7 How., 283, the License Cases, 5 How., (504.) It is not to be presumed that Congress will or intended to tax crimes or callings that are *mala in se.* Some of the occupations of men that are not *mala in se* are nevertheless prohibited.

Congress has not the right and power, either by direct or indirect legislation, to prohibit any pursuit in any State; that is a matter over which the several States have exclusive jurisdiction. Nor has Congress the power to make lawful an occupation in a State which the State has declared unlawful. That this may be laid down as a general rule there can be no question; whether there may or may not be exceptions to it, as to almost all general rules, need not be mooted in this case. It is admitted that the question, whether dealing in lottery tickets shall be lawful or unlawful, is one over which the States within their several borders have exclusive control. Probably every State in the Union has at some time permitted lotteries. Now it is prohibited by nearly all of them. But dealing in lotteries and lottery tickets is a lawful pursuit in some of the States. (See Gregory's Executrix *vs.* Trustees of Shelby College, Metcalf's Kentucky Reports, 589;

State of Missouri *vs.* Hawthorn, 9 Missouri Reports, 385.) The business of dealing in lottery tickets, then, being a lawful one in some of the States, can be taxed by Congress.

The imposition of a tax upon a trade or vocation does not induce or even invite any citizen to pursue it. A tax rather prevents than persuades its pursuit. Nor does the imposition of a tax by Congress make the pursuit lawful in any State and locality. Some of the avocations of men otherwise lawful, as the lottery business, are entirely prohibited by the States, or some of them; others are prohibited except upon conditions and after license had, as that of inn-keepers, carriers of passengers in cities, porters, peddlers, the keepers of ferries, and others. There are also manufactures, as of gunpowder, that are unlawful if carried on in crowded communities; indeed, many of the necessary and useful trades are, under the maxim *sic utere tuo ut alienum non laedas*, unlawful in particular localities. In making choice of a vocation many considerations enter into the contemplation of a prudent man; as, for instance, how it will comport with his health mentally, physically, and morally? how will it affect the mental, moral, and physical health of his neighbors and friends? would it be popular or unpopular? in pursuing it would he secure their aid and sympathy, or would he have to battle against their wishes and prejudices? is it a pursuit which is regulated by law or prohibited in whole or in part? can he pursue it without license, or can he do so only after license had? Every man must answer each and all of these questions for himself, and at his own risk. By taxing the various industrial pursuits of life Congress has not assumed to answer any one of them for him. Having erected a nuisance he cannot prevent its being abated upon the plea that the tax to the general government has been paid; if indicted for peddling or keeping an inn without State license, he could not defend himself by pleading

that he had paid his taxes to the general government; if prosecuted for pursuing a business wholly interdicted by the laws of his State, he could not escape conviction and punishment by saying that he had paid his dues to the national government. Such a plea would avail him nothing, because the general government has nothing to say or to do with the lawfulness or unlawfulness of any calling, and because of the imposition of a tax Congress has not assumed to grant a license. A tax imposed by Congress cannot be regarded as interfering with the clear and well-understood exclusive powers of the States on these questions. For convenience in nomenclature, a tax may be called a license when it is not a license, having none of the characteristics of a license.

A license is a leave or permission to do or forbear from doing an act; it may be with or without conditions. Generally it is without condition, though it may be upon consideration. It ever implies that the thing to be done or forborne to be done would be unlawful without it; whereas the tax, which is in the act of Congress called license, does not make or purport to make lawful the occupation taxed. On the contrary it is expressly provided by the 67th section of the original act, that no license, if granted, shall be construed to authorize the commencement or continuance of any trade, business, occupation, or employment therein mentioned, within any State or Territory of the United States in which it is specially prohibited by the laws thereof. This provision was introduced out of abundant caution. Such would have been the law had the proviso been omitted. But Congress thought it proper to make it plain beyond doubt or cavil that it was not intended to interfere with the exclusive power of the several States. And this is all that can be fairly inferred from the proviso. Congress left the question of the lawfulness of the business taxed to be determined between the person pursuing it and the State in

which it might be carried on. The persons appointed under the act to execute it can find no authority in it for their deciding the question whether the occupation taxed is lawful or unlawful by State or municipal law.

If an assessor or collector could, when application is made to pay the tax upon a business, determine that the pursuit was unlawful, national officers would be empowered to meddle with matters concerning which the States only have cognizance. As Congress has not assumed to say what pursuit is lawful and what unlawful in any State or Territory, neither must the officers whose duty it is to execute the law. They should keep in view the acts of Congress, and know no other law. Any other rule must result in a conflict of jurisdiction.

It cannot be said that Congress did not intend to tax occupations that are inhibited by the laws of particular States. All that can be said is that Congress did not intend that the general government or any of its officers should decide whether the pursuits taxed were lawful or not. It would have been easy to have inserted a clause to the effect that a trade or occupation prohibited by State law should not be taxed therein. By no fair rule of interpretation can such a clause be implied.

The reasons why such a clause should not have been introduced into the act are obvious. It would have induced conflicts betwixt national and State officials as to what was and what was not prohibited, and it would have enabled the States, by denouncing very small and inadequate penalties against certain industrial avocations, to evade the taxing power of the general government. If the court shall construe the statute to be in effect what it would have been with such a clause, the tax law of the United States in regard to things *mala prohibita* will be under the control and at the mercy of the States. That which is lawful to-day may not be to-morrow. That which was lawful in a particular State when the tax was im-

posed by Congress may be unlawful when the law comes to be enforced.

The issue whether the occupation taxed is lawful or not, is immaterial or collateral, and cannot arise between the taxpayer and the United States. As in laying the tax Congress did not and could not interfere with the rights of the States in regard to the lawfulness of pursuits, the federal courts should not do so. Upon an issue whether there has been an infraction of an act of Congress, the federal courts should not undertake collaterally, whether it benefits or prejudices the defendant, to say whether he has also broken a State law. A contrary ruling must beget confusion. Whether there has been a State penal law is one which concerns the State alone, and which rightfully belongs to State officials. If the States enforce their own laws, and prevent the pursuits interdicted by them, no tax can be collected by United States officers that may be imposed on such callings by Congress. On the other hand, if the States fail to enforce their own laws, neither the States nor the persons paying the tax can rightfully complain.

The question, whether the pursuit is lawful or not, is for the State to determine.

The question, whether it has been carried on without paying the national tax, is for the federal officers to decide.

The effort in these cases to blend these several and independent questions has brought out this anomalous result—an infraction of State law is relied upon as an excuse or justification for a breach of an act of Congress.

Next, we will have pleas before State courts, excusing or justifying breaches of State law, because of infractions of the laws of Congress. Two wrongs will make a right; confusion worse confounded must follow. The law forbids that one wrong should be pleaded in justification of another; justice demands that the offender suffer the appointed penalty by the

judgment of the appropriate tribunal for each wrong. Cut loose from this principle, and cases may arise where culprits, defying both governments and the laws of both, will escape punishment by pleading to one that he has wronged the other. Offenders will go unwhipped of justice because of the multitude of their sins.

We think that these general propositions may be laid down—

1st. That Congress has the constitutional power to tax all industrial pursuits.

2d. That the exercise of that power is not repugnant to the power of the States to regulate or prohibit, in whole or in part, any of the avocations of life within their respective borders.

3d. That the only mode of preventing conflict between these several and distinct powers is, for the federal officers neither directly nor collaterally to undertake to enforce State laws.

The mischiefs that would come from an effort by federal officers to enforce State laws, or State officers to enforce federal laws, are—

1st. The States would be at the mercy of the federal government, or the federal government at the feet of the States.

2d. National and State powers would be confounded.

3d. National and State courts would be brought into conflict.

4th. National officials would be invited to meddle with matters that are under the exclusive control of the States, and State officials to meddle with matters under the exclusive control of the federal government.

5th. The principle that a man cannot excuse or justify one wrong by pleading another will be overturned, thus opening a door wide for the escape of offenders against both national and State laws.

It would seem, therefore, that the question that has been under discussion must be answered in the affirmative.

2d. *If Congress can impose and collect a tax in the case supposed, do the pleadings show a breach of law and no justification or excuse therefor?*

By the 59th section of the act entitled "An act to provide internal revenue," &c., (see 12 Statutes at Large, page 453,) it is enacted that any person who shall exercise or carry on a trade or business thereinafter mentioned, without obtaining a license in that behalf, shall forfeit a penalty equal to three times the amount of money imposed for such license.

Lottery ticket dealers were not named in the original act. But by the amendment thereto, (see Stat. at Large, 12 vol., page 715,) the 64th section was amended, requiring lottery ticket dealers to pay one thousand dollars for each license, and the business defined.

The 37th section of the act makes it take effect, except when otherwise indicated, from and after its passage. (See 12 Stat. at Large, 730.)

The tax upon lottery license is nowhere excepted in the act. That part of the amendatory act requiring adhesive stamps upon lottery tickets did not go into effect till the 1st May, 1863. (See section 2d of the amendatory act, 12 Stat. at Large, 718.)

The 64th section of the original act requires that for each license granted the tax shall be respectively and annually paid. (See 12 Stat. at Large, 455.) The 7th section (see page 434) makes the first Monday in May of each year succeeding the 1st day of August, 1862, the time from and to which all licenses were to run.

All dealers in lottery tickets, then, after the 3d March, 1863, the date of the amendatory act, should have taken out licenses to the 1st May, 1863, and paid for that fraction of a year.

The records in this court do not show on what days the suits were brought in the district court for New Jersey; they were brought to the June term of the court, that being the first Monday in June. It is alleged in the declaration that the defendants carried on and exercised the business of lottery dealers at Jersey City on the 1st day of April, 1863, and at divers days and times between that day and the time of bringing the suits. The suits, being each for five hundred dollars, were evidently brought for the penalty incurred in not having a license for the month of April.

The declarations are apt in form and sufficient in substance. That debt will lie for a penalty is too familiar to require any citation of authority.

Vassar was indicted at the October term, 1863, and accused of having been a dealer in lottery tickets at Albany, New York, on the 5th day of March, 1863, and on divers days and times between that day and the finding of the indictment. The indictment is sufficient.

The acts of Congress do impose a tax on lottery dealers and denounce a penalty for its non-payment.

A reversal of the judgments is most respectfully asked.

JAMES SPEED,

Attorney General.